

2001

Ruth Leila Mitchell, Ruth Folger v. Donald R. Mitchell : Brief of Appellee

Utah Court of Appeals

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RUTH LEILA MITCHELL,]	
Aka RUTH FOULGER.]	BRIEF OF APPELLEE
]	
Petitioner/Appellant,]	
]	
vs.]	Appeal Case No. 20010711- CA
]	
DONALD R. MITCHELL,]	Priority No. 15
]	
Respondent/Appellee.]	

Appeal from the Third District Court
Salt Lake County, State of Utah
Honorable Bruce Lubeck, District Court Judge

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FILED
Utah Court of Appeals

FEB - 1 2002

Paulette Stagg

IN THE UTAH COURT OF APPEALS

RUTH LEILA MITCHELL,]
Aka RUTH FOULGER,]
]

Petitioner/Appellant,]
]

VS.]
]]

DONALD R. MITCHELL,]
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Respondent/Appellee.]

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to §§ 78-2a-3 (2) (h) and (j), Utah Code Ann., 1953 as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting summary judgment in favor of Mr. Mitchell, the defendant/appellee, upon a finding that, as a matter of law, the undisputed material facts, and that the case of *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah App. 1988), was controlling, he was entitled to an order dismissing Mrs. Foulger's petition to modify the parties' decree of divorce.

In reviewing a grant of summary judgment, this Court need not defer to the trial court's ruling, but only inquire into whether the trial court erred in applying the governing law and whether the trial court correctly held that that there were no disputed issues of material fact. *Ron Shepherd Ins., v. Shields*, 883 P.2d 650, 654 (Utah 1994).

The issue was preserved in the trial court by Mrs. Foulger's objection to the Domestic Relation Commissioner's recommendation. (R. at pp. 111-13)

2. Whether Mr. Mitchell should be awarded his costs and attorney fees incurred in defending against Mrs. Foulger's claims, including this appeal. Mr. Mitchell submits that there is no legal or factual basis for Mrs. Foulger's appeal.

A trial court's decision to deny fees is a question of law to be reviewed for correctness. *Jorgensen's v. Ogden City Mall Co.*, 2001 UT App 11, ¶ 11. The trial court's broad discretion in determining fees will be considered against an abuse-of-discretion standard. *Id.* In addition, attorney fees may be awarded in a case bringing a frivolous appeal, *Cooke v. Cooke*, 2001 UT App. 110, ¶ 14.

This issue was preserved in the trial court by Mr. Mitchell's motion for summary judgment. (Appellee's Addendum attached hereto.) Attorney fees on appeal may be awarded pursuant to the provisions of rule 33 of the Utah Rules of Appellate Procedure, which provides for an award of attorney fees if the appeal is frivolous.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

The Appellee submits that there are no constitutional provisions, statutes, ordinances, rules or regulations before the Court whose interpretation is determinative of the appeal or of central importance to the appeal.

STATEMENT OF THE CASE

I. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

1. On or about January 29th, 2001, Mrs. Foulger filed a Petition to modify the Decree of Divorce that dissolved the marriage between her and Mr. Mitchell.

This Petition alleges that she is now totally disabled and requested that the court modify the original divorce decree to award her an interest in Mr. Mitchell's retirement benefits. (R. at pp. 45-50)

2. Mr. Mitchell filed, on March 13th, 2001, a motion for a summary judgment, arguing that the Utah case of *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah App. 1988) was controlling in the instant case; and that, accordingly, the petition to modify the divorce decree as requested by Mrs. Foulger should be dismissed. (R. at pp. 58-59; Appellee's Addendum, attached hereto.)

3. The motion for summary judgment was argued before Commissioner Thomas N. Arnett on April 26th, 2001. Thereafter, the Commissioner recommended that Mr. Mitchell's motion be granted. (R. at pp. 110, 134-35)

4. Mrs. Foulger objected to the Commissioner's recommendation. (R. at pp. 111-13)

5. On July 17th, the trial court, the Honorable Bruce Lubeck presiding, heard argument on Mrs. Foulger's objection, overruled it, and affirmed the entry of the summary judgment. The trial court's ruling was entered as an order on August 1st, 2001. (R. at pp. 140, 148-49)

6. This instant appeal was initiated on August 8, 2001. (R. at pp. 151-52)

II. STATEMENT OF FACTS

1. These parties were divorced on October 3, 1977. (R. at p. 30)
2. Pursuant to the original divorce decree, Mrs. Mitchell was awarded the marital home, all of the parties' personal property, except one single bed, a portable television set, enough linens, bedcoverings and utensils to set up housekeeping, one of the vehicles, and Mr. Mitchell's camping equipment and guns. Mr. Mitchell was ordered to pay all of the marital debt, other than the home mortgages. (R. at pp. 32-34)
3. At the time the original divorce was litigated, Mr. Mitchell was an employee of Kennecott and was enrolled in its retirement benefits program. These facts were well known to Mrs. Foulger. (Addendum no. 5)¹
4. The parties' Decree of Divorce was later modified by Order dated January 14, 1981. (R. at pp. 43-44)
5. The Order of modification made pursuant to Mrs. Foulger's required an increase in child support and dealt with a life insurance issue. (*Id.*)
6. The Petitioner married John Foulger in 1984. (Addendum no. 5)
7. The Petitioner was later divorced from Mr. Foulger. (*Id.*)

¹ As noted by the Appellant, Mr. Mitchell's memorandum in support of his motion for a summary judgment, and his supporting affidavit, is not found in the record. Mr. Mitchell's supporting memorandum is attached as an addendum to this brief.

8. Mr. Mitchell is now retired and is receiving retirement benefits from Kennecott. (*Id.*)

9. All of the parties' children have reached their majority. (*Id.*)

10. On or about January 29th, 2001, Mrs. Foulger filed the petition which is now before the Court to modify the Decree of Divorce alleged that she was now totally disabled and requested that the court modify the original divorce decree to award her an interest in Mr. Mitchell's retirement benefits. (R. at pp. 45-50)

11. Counsel for Mr. Mitchell wrote to Mrs. Foulger's counsel, advising him that this Court's ruling in *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah App. 1988), and in *Ostler v. Ostler*, 789 P.2d 713 (Utah App. 1990) appeared to be controlling in this case. (Exhibit "E" to Appellee's Addendum, attached hereto.)

12. On March 13th, 2001, Mr. Mitchell filed a motion for a summary judgment, arguing that *Throckmorton*, 767 P.2d 121, was controlling in this case; and that, accordingly, the petition to modify the divorce decree as requested by Mrs. Foulger should be dismissed. (R. at pp. 58-59 and Appellee's Addendum.)

13. The motion for summary judgment was argued before Commissioner Thomas N. Arnett on April 26th, 2001, who recommended that Mr. Mitchell's motion be granted. (R. at pp. 110, 134-35)

14. On July 17th, 2001, the trial court heard Mrs. Foulger's objection to the Commissioner's recommendation, overruled it, and affirmed the entry of the summary judgment. (R. at pp. 153-54)

SUMMARY OF ARGUMENTS

The trial court correctly applied the undisputed material facts to Utah law, as set forth in the cases of *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah App. 1988), and *Ostler v. Ostler*, 789 P.2d 713 (Utah App. 1990), and properly granted Mr. Mitchell's motion for a summary judgment dismissing Mrs. Foulger's petition to modify the parties' decree of divorce.

The doctrine of *res judicata* does apply to divorce proceedings despite the continuing jurisdiction of Utah's district courts to modify divorce decrees upon proof of significant changes in the divorced parties' circumstances. The doctrine has been held to specifically apply with regard to claims made against retirement benefits in divorce cases heard prior to the Utah Supreme Court's ruling in the case of *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982).

Utah law with regard to Mrs. Foulger's claim that she now be awarded a share of Mr. Mitchell's retirement income was clearly defined prior to her filing her petition to modify these parties' decree of divorce. She presents no new legal argument or factual basis that is unique, or that sets the instant claim apart from

similar claims for a distribution of retirement benefits earlier argued by other parties to this Court. Mr. Mitchell should be awarded his costs and attorney fees.

ARGUMENT

I. THE GRANT OF THE MOTION FOR A SUMMARY JUDGMENT WAS APPROPRIATE AS A MATTER OF LAW

Mrs. Foulger, in this action, is seeking to modify the decree of divorce previously entered between herself and Mr. Mitchell to raise a property distribution issue that could have been, and should have been, dealt with in the original divorce proceeding. After Mrs. Foulger filed her petition, Mr. Mitchell moved for a summary judgment, requesting that the petition be dismissed.

The grant of a summary judgment is appropriate if the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Boyce ex rel. Boyce v. Marble*, 1999 UT 71, ¶ 18, 982 P.2d 565. Utah case law, applied to the undisputed facts in this case, did establish, as a matter of law that Mr. Mitchell was entitled to the grant of a summary judgment dismissing Mrs. Foulger's petition. This applicable case law is found in *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah App. 1988), and in *Ostler v. Ostler*, 789 P.2d 713 (Utah App. 1990).

Mr. Mitchell argued, and the trial court agreed, that this Court's earlier decision in *Throckmorton*, 767 P.2d 121, which dealt directly with the very issue

presented in the instant case, was controlling and should be applied. Mrs. and Mr. Throckmorton, the petitioner and appellant, respectfully, in that case appealed the trial court's denial of Mrs. Throckmorton's request to modify the Throckmorton's decree of divorce to grant to her one-half of Mr. Throckmorton's retirement benefits.

The fact patterns and circumstances in *Throckmorton, Id.*, and in the instant case, are extremely similar. A comparison of the facts in the case now before you with the facts in *Throckmorton* reveal marriages that had lasted many years, that the parties' children from both marriages had reached their majority at the time of the petitions to modify, that the respondents had both retired, and that both of the petitioners; *i.e.*, Mrs. Throckmorton and Mrs. Foulger, were suffering medical problems not present at the time of the divorce, that Mrs. Foulger was aware of the existence of her husband's retirement plan at the time of the divorce, and that the original decrees of divorce were silent with regard to the husbands' retirement benefits. The only real difference in this case from *Throckmorton* is that Mrs. Throckmorton was also seeking an alimony increase (which she did receive), while in the instant case, Mrs. Foulger remarried shortly after her divorce from Mr. Mitchell.

Mrs. Foulger made no effort in the trial court to distinguish *Throckmorton*, 767 P.2d 121, from the instant case. In her brief on appeal she argues for the first

time that *Throckmorton* is “clearly factually different.” Mrs. Foulger argues that her petition for a modification is based upon two alternative legal theories; which are (1) that the asset was never addressed in the original proceeding, and (2) that there is the existence of a very significant and life altering changes in her actual needs. The problem with this argument is that the cases are not factually different, and Mrs. Foulger’s is seeking a share of Mr. Mitchell’s pension benefits. Both of these issues were, in fact, addressed by this Court’s ruling in *Throckmorton*.

The Court dealt squarely with the pension issue in its discussion of the effect of *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982), in which the Utah Supreme Court recognized pension benefits as marital assets. Mrs. Throckmorton had argued that because at the time of her divorce Utah law did not recognize pension benefits as a marital asset that *Woodward* should be given retroactive effect. The Court of Appeals refused to give *Woodward* retroactive effect recognizing the compelling policy interest favoring the finality of property settlements. *Throckmorton*, 767 P.2d at 124. As in *Throckmorton*, the Mitchell divorce was entered prior to the *Woodward* decision.

In a more recent case that is also on point, *Ostler v. Ostler*, 789 P.2d 713 (Utah App. 1990), this Court looked again at a petition to modify a decree of divorce seeking a distribution of the ex-husband’s retirement account. The ex-

wife in *Ostler* claimed that she was not aware of the retirement benefits at the time the divorce was prosecuted. This Court, consistent with the *Throckmorton* decision, affirmed the trial court's decision to not modify the decree of divorce to include a distribution of the retirement account. *Ostler*, 789 P.2d at 715. This Court also refused once again to make *Woodward* retroactive, holding that Mrs. Ostler's claim of lack of knowledge regarding the retirement benefits did not constitute the requisite change of circumstances necessary to modify her decree of divorce. *Id.* Nevertheless, it appears to be Mrs. Foulger's argument that despite the Court's clear ruling in *Throckmorton* and in *Ostler* that the principles of *Woodward* should be applied. This is clearly not the status of the current case law.

Mrs. Foulger argues that the granting of Mr. Mitchell's motion was premature inasmuch as discovery was incomplete or ongoing. However, motions for summary judgment may be brought at any time and are not necessarily subject to the constraints of case management orders or Ut. R. Civ. P. 26. Mrs. Mitchell could have, pursuant to the provisions of Ut. R. Civ. P. 56 (f), sought a continuance to take additional discovery, but chose to do so. Such discovery was unnecessary in any event. Even assuming that Mrs. Foulger's physical infirmities are present, such does not alter the effect of the law as applied to the instant undisputed facts

The affidavits and pleadings that were before the trial court were sufficient to establish that no genuine issues of material fact existed which would preclude the granting of Mr. Mitchell's motion as a matter of law.

Both the lower court's domestic relations commissioner, Commissioner Thomas Arnett, Jr., and the trial court judge, the Honorable Bruce Lubeck, recognized that *Throckmorton* and *Ostler* were controlling in light of the undisputed facts and, accordingly, granted Mr. Mitchell's motion for the grant of a summary judgment.

II. THE DOCTRINE OF *RES JUDICATA* IS APPLICABLE TO THE INSTANT CASE

The state of the law in Utah in 1977, when the Mitchell's Decree of Divorce was granted, did not require the specific division of retirement benefits as a separate category of marital property. It wasn't until 1982 that the Utah Supreme Court first recognized pension benefits as a marital asset. *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982). However, as discussed above *Woodward* was not given retroactive effect. *Throckmorton*, 767 P.2d at 124; *Ostler*, 789 P.2d at 715.

This Court did note, of course, how the application of the doctrine of *res judicata* is unique in divorce actions because of that equitable doctrine which allows courts to reopen the case on a demonstration that there is a substantial

change of circumstances. On this point this Court in *Throckmorton* made reference to *Thompson v. Thompson*, 709 P.2d 360 (Utah 1985), in which it was held that in order to modify a prior property award the moving party must establish a substantial change of circumstances which was not within the original contemplation of the parties or the court at the time the original decree was rendered. Nevertheless, the Court of Appeals affirmed in *Throckmorton* the trial court's ruling denying Mrs. Throckmorton an interest in Mr. Throckmorton's retirement benefits as there had been a fair opportunity to have the issue determined in the original proceeding.²

This Court affirmed the trial court's decision, holding that the doctrine of *res judicata* applies to divorce proceedings. *Throckmorton*, 767 P.2d at 123. In so holding, this Court quoted from *Jacobsen v. Jacobsen*, 703 P.2d 303 (Utah 1985), "When there has been an adjudication, it becomes *res judicata* as to those issues which were determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding."

As in *Throckmorton*, the issue of Mr. Mitchell's retirement benefit plan was well within these parties' contemplation at the time the original divorce was

² This Court noted that allowing Mr. Throckmorton to keep his retirement benefits considering the totality of the original property distribution did not offend the Court's sense of justice as Mr. Throckmorton, under the original decree was ordered to pay \$12,000 in marital debts while Mrs. Throckmorton was

litigated. Mrs. Foulger cannot establish the requisite substantial change of circumstances.

Utah Code Annotated may provide for modifications based upon substantial material changes in circumstances not foreseeable at the time of the divorce, but this is clearly not without limits. In this case Mr. Mitchell's retirement benefits were well within the contemplation of the parties'. Mrs. Foulger could have dealt with the issue at the time of the original litigation.

The issues raised in the modification petition are *res judicata*. This is clearly established by case law. *Throckmorton*, 767 P.2d 123.

III. MR. MITCHELL SHOULD BE AWARDED COSTS AND ATTORNEY FEES

Mr. Mitchell is entitled to an award of his costs and a reasonable attorney's fee. Prior to her filing the instant Petition, Mr. Mitchell's attorney was contacted by Mrs. Foulger's attorney requesting information on any specific law or facts that would suggest that Mrs. Foulger would not now be entitled to a division of Mr. Mitchell's retirement benefits. In response, Mr. Mitchell's attorney wrote back to Mrs. Foulger's attorney. In this correspondence specific reference was made to both the *Throckmorton* and *Ostler* cases. Cites to both cases were provided. In light of this, Mrs. Foulger had adequate opportunity to consider the

awarded the family home and ultimately received \$24,000 in equity in that home.

propriety of proceeding with her Petition. Despite the clear similarity of the fact patterns presented and the case law being on point, she nevertheless proceeded with the her petition to modify the divorce decree.

Mr. Mitchell requested that the trial court award him his costs and attorney fees incurred in defending against Mrs. Foulger's claims. The Commissioner declined to make this award. Believing that the matter was resolved based upon the clear status of the case law, he did not pursue this claim. However, it is now appropriate, based upon the instant appeal, that he be awarded his costs and a reasonable attorney's fee pursuant to the provisions of rule 33 of the Utah Rules of Appellate Procedure, which provides for an award of attorney fees if the appeal is frivolous. A frivolous appeal has application in cases with no "reasonable legal or factual basis". *Cooke v. Cooke*, 2001 UT App. 110, ¶ 14, *see also, Maughan v. Maughan*, 770 P.2d 156, 162 (Utah App. 1989). Mr. Mitchell submits that there is no legal or factual basis for Mrs. Foulger's appeal.

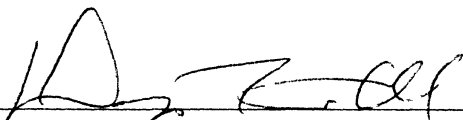
CONCLUSION

The trial court correctly concluded that there were no disputed issues of material fact and that Mr. Mitchell was entitled to a summary judgment dismissing Mrs. Foulger's petition for modification as a matter of law. This Appellee respectfully requests that following its review of the trial court's grant

of summary judgment for correctness, even giving no particular deference to its conclusions of law, that this Court find that the trial court did not err in applying the governing law to the undisputed issues of material fact and that it affirm the grant of summary judgment.

Mr. Mitchell respectfully requests that this Court grant him his costs and attorney fees, or, in the alternative, remand the case to the District Court directing it to make the award.

DATED this 31st day of January, 2002.

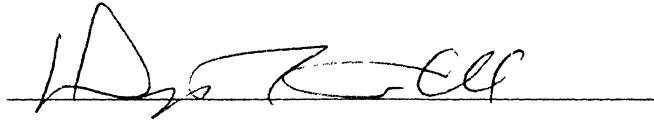


Douglas T. Hall
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a two true and correct copies of the foregoing Appellee's Brief was mailed, first class postage prepaid, this 31st day of January, 2002, to the following:

W. Kevin Jackson
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A handwritten signature in black ink, appearing to read "W. Kevin Jackson", is written over a horizontal line.

APPELLEE'S ADDENDUM

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**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH**

RUTH LEILA MITCHELL, aka RUTH FOULGER,]	
]	MEMORANDUM OF POINTS
]	AND AUTHORITIES IN
Plaintiff/Petitioner,]	SUPPORT OF MOTION FOR
]	A SUMMARY JUDGMENT
vs.]	
]	Case No. D-26438
DONALD R. MITCHELL,]	
]	Judge Anne M. Stirba
Defendant/Respondent.]	Commissioner Thomas N. Arnett, Jr.

COMES NOW the Respondent, by and through counsel, pursuant to the provisions of Rule 4-501 of the Utah Code of Judicial Administration, and submits the following Memorandum of Points and Authorities in support of his motion for a Summary Judgment in his favor dismissing the Petition to Modify the Decree of Divorce, and for an award of a reasonable attorney's fee and his costs incurred herein.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. These parties were divorced on October 3, 1977. A copy of the Decree of Divorce (the "Decree") is attached hereto as Exhibit "A", and by reference is incorporated herein.
2. At the time the original divorce was litigated, Mr. Mitchell was an employee of Kennecott and was enrolled in its retirement benefits program. These facts were well known

to Mrs. Folger. Affidavit of Donald R. Mitchell, paragraph 4, Mr. Mitchell's affidavit is attached hereto as Exhibit "B" and by reference incorporated herein.

3. The Decree was later modified by Order dated January 14, 1981. A copy of the Order modifying the Decree is attached hereto as Exhibit "C", and by reference is incorporated herein.

4. The Order of modification required an increase in child support and dealt with life insurance issues. *Id.*

5. The Petitioner married John Folger in 1984. Mitchell affidavit at paragraph 5.

6. The Petitioner is since divorced from her husband. *Id.* at paragraph 6.

7. Mr. Mitchell is now retired and is receiving retirement benefits from Kennecott. *Id.* at paragraph 7.

8. All of the parties' children have reached their majority. *Id.* at paragraph 8.

ARGUMENT

I

The grant of a summary judgment is appropriate if the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Boyce ex rel. Boyce v. Marble*, 1999 UT 71, ¶ 18, 982 P.2d 565.

The undisputed material facts show that the petitioner, Mrs. Folger, is now seeking to modify the Decree of Divorce to raise a property distribution issue that could have been, and should have been, dealt with in the original divorce proceeding.

The Utah Court of Appeals has earlier dealt directly with the very issue presented in the instant case. In *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah App. 1988), the petitioner in that case, Mrs. Throckmorton, appealed the trial court's denial of her request to

modify the Throckmorton's decree of divorce to grant to her one-half of Mr. Throckmorton's retirement benefits. The Appellate Court affirmed the trial court's decision, holding that the doctrine of *res judicata* applies to divorce proceedings. *Id.* at p. 123. (A copy of *Throckmorton* is at Exhibit "D".) In so holding, the Court of Appeals quoted from *Jacobsen v. Jacobsen*, 703 P.2d 303 (Utah 1985), "When there has been an adjudication, it becomes *res judicata* as to those issues which were determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding."

The factual circumstances in *Throckmorton* and in the instant case are very similar. A comparison of the facts in the instant case with the facts in *Throckmorton* reveal marriages that had lasted many years, that the parties' children from both marriages had reached their majority at the time of the petitions to modify, that the respondents had both retired, and that both of the petitioners were suffering medical problems. And, as in *Throckmorton*, Mrs. Folger knew of Mr. Mitchell's retirement program with Kennecott. The only real difference in the case is that Mrs. Throckmorton was also seeking an alimony increase (which she did receive), while in the instant case, Mrs. Folger remarried shortly after her divorce from Mr. Mitchell.

The Court of Appeals did note how the application of the doctrine of *res judicata* is unique in divorce actions because of that equitable doctrine which allows courts to reopen the case on a demonstration that there is a substantial change of circumstances. On this point, the Appellate Court made reference to *Thompson v. Thompson*, 709 P.2d 360 (Utah 1985), in which it was held that in order to modify a prior property award the moving party must establish a substantial change of circumstances which was not within the original contemplation of the parties or the court at the time the original decree was rendered.

Nevertheless, the Court of Appeals affirmed the trial court ruling denying Mrs. Throckmorton an interest in Mr. Throckmorton's retirement benefits as there had been a fair opportunity to have the issue determined in the original proceeding. As in *Throckmorton*, the issue of Mr. Mitchell's retirement benefit plan was well within these parties' contemplation at the time the original divorce was litigated. Mrs. Folger cannot establish the requisite substantial change of circumstances.

The Court of Appeals also discussed the effect of *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982), in which the Utah Supreme Court recognized pension benefits as marital assets. Mrs. Throckmorton had argued that because at the time of her divorce Utah law did not recognize pension benefits as a marital asset, *Woodward* should be given retroactive effect. The Court of Appeals refused to give *Woodward* retroactive effect recognizing the compelling policy interest favoring the finality of property settlements. *Throckmorton* at p. 124. The instant divorce was entered prior to the *Woodward* decision.

In a more recent case, *Ostler v. Ostler*, 789 P.2d 713 (Utah App. 1990), the Court of Appeals looked again at a petition to modify a decree of divorce seeking a distribution of the ex-husband's retirement account. The ex-wife in *Osterler* claimed that she was not aware of the retirement benefits at the time the divorce was prosecuted. The Court of Appeals, consistent with the *Throckmorton* decision, affirmed the trial court's decision to not modify the decree of divorce to include a distribution of the retirement account.

The Court of Appeals in *Ostler* referenced the *Throckmorton* case. It again refused to make *Woodward* retroactive and held that Mrs. Ostler's claim of lack of knowledge regarding the retirement benefits did not constitute the requisite change of circumstances necessary to modify her decree of divorce. *Ostler, supra*.

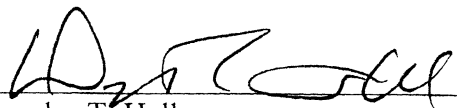
II

Mr. Mitchell is entitled to an award of his costs and a reasonable attorney's fee. Prior to her filing the instant Petition, Mr. Mitchell's attorney was contacted by Mrs. Folger's attorney requesting information on any specific law or facts that would suggest that Mrs. Folger would not now be entitled to a division of Mr. Mitchell's retirement benefits. In response, Mr. Mitchell's attorney wrote back to Mrs. Folger's attorney making reference to both *Throckmorton* and *Ostler* and providing the cites to both cases. A copy of Mr. Hall's letter to Mr. Jackson is attached at Exhibit "E" and by reference is incorporated herein. In light of this, Mrs. Folger had adequate opportunity to consider the propriety of proceeding with the Petition. Despite the clear similarity of facts presented and the case law being on point, she nevertheless proceeded with the instant Petition.

CONCLUSION

Mrs. Folger had the opportunity to litigate the issue of Mr. Mitchell's retirement benefits at the time of the divorce. Since she failed to do so, her claim is barred under the doctrine of *res judicata*. In addition, case law, lends full support to this conclusion. Mr. Mitchell prays this Court to grant the instant motion for a summary judgment to dismiss Mrs. Folger's petition to modify the decree of divorce to grant her an interest in his retirement benefits and to award him his cost incurred herein along with a reasonable attorney's fee.

DATED this 13th day of March, 2001.

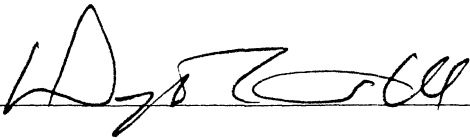


Douglas T. Hall
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed,
first class postage pre-paid, this 13th day of March, 2001, to the following:

W. Kevin Jackson
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
311 South State Street, Suite 380
Salt Lake City, Utah 84111-2379



A handwritten signature in black ink, appearing to read "W. Kevin Jackson", is written over a horizontal line.

DOUGLAS T. HALL

ATTORNEY AT LAW

Facsimile
801-263-1426

4885 South, 900 East, Suite 208, Salt Lake City, Utah 84117-5793
Telephone 801-259-5000

In Utah County
801-756-7831

January 23, 2001

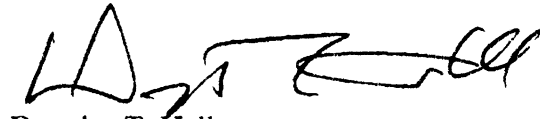
W. Kevin Jackson
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
311 South State Street, Suite 380
Salt Lake City, Utah 84111

Re: *Mitchell (Folger) v. Mitchell*

Dear Mr. Jackson:

I do not believe that your client is entitled to a portion of Mr. Mitchell's retirement benefits. Not only did Mrs. Folger remarry shortly after her divorce from Mr. Mitchell, but there was adequate opportunity to raise the issue of a distribution of retirement benefits at the time the original decree of divorce was being heard. I invite your attention to *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah App. 1988), and the more recent case of *Ostler v. Ostler*, 789 P.2d 713 (Utah App. 1990). I believe that the "policy interest favoring the finality of property settlements", *Oster, supra*, is applicable in this case.

Very truly yours,



Douglas T. Hall

DTH/jr
cc: Don Mitchell

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